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March 31, 2004

VIA FACSIMILE TO 202/219-3923 AND FEDERAL EXPRESSLawrence H. Norton
General Counsel
Office of the General Counsel
Federal Election Commission
999 E Street, NW
Washington, D.C. 20463**Re: MUR 5410 – Oberweis Dairy, Inc.**

Dear Mr. Norton:

Oberweis Dairy, Inc. ("Oberweis Dairy") respectfully submits this response in opposition to the Complaint filed by the Democratic Party of Sangamon County with the Federal Election Commission ("Commission"), and assigned MUR 5410. This response is made after Oberweis Dairy received a copy of the Complaint from the Commission on March 1, 2004. For the reasons set forth in detail below, Oberweis Dairy believes that the Commission should take no action against Oberweis Dairy in this matter.

I. OVERVIEW**A. Oberweis Dairy**

Oberweis Dairy is a family-owned business processing and delivering quality milk directly to homes since 1927. Incorporated in Illinois in 1954, Oberweis Dairy's home delivery service area now serves more than 45,000 customers in Chicago, Indiana, Central Illinois and St. Louis, Missouri.

Over the past 50 years, Oberweis Dairy has also perfected a formula using the cream from premium milk to produce the best ice cream available. Oberweis Dairy now maintains 32 ice cream and dairy stores located throughout the Chicago and St. Louis metropolitan areas serving ice cream confections, milk and other Oberweis Dairy products to tens of thousands of customers.

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Oberweis Dairy has marketed its milk, ice cream products and home delivery services through advertisements using print media, cable television and radio at various times since 1998. Beginning in 1999, and continuing on an annual basis thereafter, James D. Oberweis, Chairman of Oberweis Dairy, urged Robert Renaut, Oberweis Dairy's President and CEO, to engage in broadcast television advertising as a means of introducing Oberweis Dairy's ice cream products and home delivery services to a broader audience. Until 2003, Robert Renaut chose not to pursue broadcast advertising in light of Oberweis Dairy's then limited number of retail stores and the historical success of Oberweis Dairy's telemarketing activities, from which Oberweis Dairy had obtained over 70% of its home delivery customers. Mr. Renaut continued to engage in cable television and radio advertising for Oberweis Dairy's retail stores and wholesale accounts.

From September 2002 to March 2003, Oberweis Dairy experienced a significant decrease in sales at its Oberweis Dairy stores. In addition, by the end of the first quarter of 2003, Oberweis Dairy learned that federal "Do-Not-Call" legislation, slated to become effective in the fall of 2003, would significantly limit Oberweis Dairy's telemarketing activity. By this time, Oberweis Dairy had more than doubled the number of retail stores that existed in 1999. Based on these factors, Robert Renaut decided in the Spring of 2003 to authorize the production of broadcast television advertisements for Oberweis Dairy.

Beginning in May 2003, Mr. Renaut interviewed several producers for the creation of broadcast television commercials for Oberweis Dairy. The choice of producers was made solely by Mr. Renaut based upon the producer's ability to meet his time frame and stay within budget. The television ads were broadcast only in areas in which Oberweis Dairy services its home delivery and wholesale customers and where its ice cream stores are located.

B. James D. Oberweis

James D. Oberweis is the grandson of Peter Oberweis, the founder of Oberweis Dairy. In 1986, Mr. Oberweis purchased Oberweis Dairy and he has served as Chairman of the Oberweis Dairy board of directors since that time. On July 7, 2003, Mr. Oberweis filed his Statement of Candidacy with the Illinois Secretary of State's Office as a Republican for the U.S. Senate in Illinois.

C. The Democratic Party of Sangamon County

On or about February 17, 2004, Mr. Tim Timoney filed a Complaint on behalf of the Democratic Party of Sangamon County (the "Complainant") with the Commission seeking an investigation of "Oberweis, his company and his campaign." A true and accurate copy of the Complaint is attached hereto as Exhibit A.

On March 1, 2004, Oberweis Dairy received a copy of the Complaint from the Commission along with a cover letter assigning the Complaint matter number MUR 5410 and

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offering Oberweis Dairy the opportunity to demonstrate in writing that no action should be taken against Oberweis Dairy in this matter.

II. THE COMPLAINT

The Complaint generally alleges that Mr. Oberweis "is knowingly and willfully breaking the Federal Election Campaign Act by illegally using his company's corporate treasury funds to influence his election." (Complaint at 1.) Although the Complaint lacks detailed allegations of wrongdoing, it appears to focus on two distinct themes. First, the Complainant contends that Mr. Oberweis has "illegally coordinated television ads sponsored by [Oberweis Dairy] which feature him and are intended to influence his election." *Id* Second, the Complainant contends that Mr. Oberweis and his campaign are "systematically extracting other illegal corporate contributions from Oberweis Dairy" by hosting "meet and greet" events at Oberweis Dairy stores, giving Oberweis Dairy ice cream to attendees at the events, and sponsoring a sweepstakes contest in which the winner would receive a lifetime supply of free Oberweis Dairy ice cream. *Id*.

Oberweis Dairy's response to each of the Complainant's allegations is set forth below.

A. The Oberweis Dairy Advertisements Are Not Coordinated Communications.

The Complainant alleges Oberweis Dairy sponsored a series of television advertisements featuring Mr. Oberweis that constitute an "open-and-shut case of coordination under Commission rules." (Complaint at 3) (citing 11 C.F.R. §§ 109.21(c)-(d).) In fact, Oberweis Dairy only ran one television advertisement for its milk products and delivery service within 120 days of the March 16, 2004 primary election. This 30 second television spot, entitled "Sunny Side Up," ran during the months of December 2003 and January 2004.

The "Sunny Side Up" advertisement was broadcast in the television markets encompassing Champaign, Springfield, Peoria and Bloomington, Illinois, areas in which Oberweis Dairy serves a significant number of home delivery and wholesale customers. The advertisement aired in a further effort to increase Oberweis Dairy's home delivery customer base in the face of significant restrictions placed on Oberweis Dairy's telemarketing efforts by the federal "Do-Not-Call" legislation.

Pursuant to 11 C.F.R. § 109.21, television advertisements must satisfy several conditions before it rises to the level of a "coordinated communication." Under section 109.21, in order for a communication to be deemed a "coordinated communication," it must be (1) "paid for by a person other than that candidate[;]" (2) satisfy at least one of the "content standards" set forth in Section 109.21(c); and (3) satisfy at least one of the "conduct standards" set forth in Section 109.21(d). Oberweis Dairy admits that it paid to create and show its television advertisements. Oberweis Dairy, however, specifically denies that any of the advertisements satisfy the "content standards" of 11 C.F.R. § 109.21(c). For the reasons set forth below, the Oberweis Dairy

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advertisements do not constitute "coordinated communication" under 11 C.F.R. § 109.21, and the Commission should take no action against Oberweis Dairy in this matter.

1. The Oberweis Dairy Advertisements Do Not Meet the "Content Standards" for Coordinated Communications.

Section 109.21(c) provides that the "content standards" can be satisfied with proof of one of four types of content, none of which apply to any of the Oberweis Dairy television advertisements. First, the advertisements do not constitute "electioneering communications" under 11 C.F.R. § 100.29 because they were not publicly distributed within 30 days before the March 16, 2004 Illinois primary election. See 11 C.F.R. § 100.29(a)(2). Only the "Sunny Side Up" advertisement ran after November 2003, and it ceased running in January 2004. Second, the advertisements do not disseminate, distribute or republish any campaign materials prepared by Mr. Oberweis or his election committee. See 11 C.F.R. § 109.21(c)(2). Third, the advertisements do not advocate the election of Mr. Oberweis for the U.S. Senate. In fact, as is discussed below, the advertisements make no mention of Mr. Oberweis' candidacy for the U.S. Senate, nor do they contain a political message of any kind. Fourth, the advertisements do not "refer[]" to a political party or to a clearly identified candidate for Federal office."

To the contrary, the advertisements only state that Mr. Oberweis is "Chairman" of Oberweis Dairy. It does not identify Mr. Oberweis as a candidate for the U.S. Senate, nor does it suggest, in any way, that Mr. Oberweis is otherwise running for election to the U.S. Senate in Illinois. Likewise, the advertisements do not identify Mr. Oberweis as the "Republican Candidate for Senate in the State of Illinois," as referenced in the definition of "clearly identified" in 11 C.F.R. § 100.17. In addition, the advertisements do not, in any way, refer to the Republican party, or any political party. Furthermore, the advertisements do not address any political issues or contain a political message of any kind such as by urging voters to participate in the political process or vote for a particular party or candidate. None of the advertisements contain traditional party symbols or marks, such as an elephant. Accordingly, Oberweis Dairy's television advertisements are not "coordinated communications" as defined by 11 C.F.R. 109.21(c)

2. Complainant's Reliance on MUR 4340 and 3918 Is Misplaced.

Complainant cites MURs 4340 and 3918 in support of his contention that Oberweis Dairy's television advertisements violate Section 441b of the Federal Election Campaign Act (the "FECA"). However, both MURs are distinguishable from the facts here. In MUR 4340, Dal LaMangna was a candidate for Congress in the 1996 election as well as the President of TWEEZERMAN Corporation (the "Corporation"). The Corporation purchased nine corporate print advertisements in five different magazines that included the following language or a slight variation thereof: "TWEEZERMAN FOR CONGRESS IN '96 Vote for Dal LaMagna in the

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Third District on Long Island.” (Conciliation Agreement at 3.) The Commission concluded that the advertisements were a violation of Section 441b(a) of the FECA.

Similarly, in MUR 3918, Joel Z. Hyatt was a candidate for the United States Senate in 1994 and a founding partner of Hyatt Legal Services (“HLS”). HLS purchased eight radio advertisements, four of which, it was alleged, contained references associating HLS, and therefore Hyatt, with two issues of public interest: health care and crime. Without specifically addressing Section 441b(a) of the FECA, the Commission found that the radio advertisements constituted contributions under Section 441a(a)(7)(B)(i) of the FECA.

Unlike the advertisements in MURs 4340 and 3918, Oberweis Dairy’s advertisements do not advocate the election of Mr. Oberweis for the U.S. Senate, nor do the advertisements allude to any public policy issues. Rather, the Oberweis Dairy advertisements merely promote the home delivery of Oberweis Dairy’s milk products and its ice cream stores. For these reasons, MURs 4340 and 3918 are readily distinguishable and fail to offer any support to Complainant’s allegation that Oberweis Dairy has violated Section 441b of the FECA.

3. Civil Penalties Are Not Warranted Because Oberweis Dairy Acted In Good Faith and Reasonably Relied on the Advice of Its Counsel Prior to Airing the Advertisement.

Complainant also argues that because Oberweis Dairy sought legal advice prior to airing the advertisement, “one can conclude that [Oberweis Dairy] is knowingly and willfully breaking the law.” (Complaint at 1.) Not only is this contention wholly without merit, it is well established under federal precedent that by seeking the advice of counsel prior to airing the advertisement, Oberweis Dairy exhibited nothing short of good faith.

In *Federal Election Commission v. Friends of Jane Harman*, 59 F. Supp. 2d 1046, 1057-59 (C.D. Cal. 1999), the Federal Election Commission brought an enforcement action against defendants Friends of Jane Harman and Jacki Bacharach, treasurer for the Harmon Campaign, (collectively “the Defendants”) arising out of a fundraising event held for former United States Representative Jane Harman at the headquarters of Hughes Aircraft Company. Although the Court concluded that certain aspects of the fundraising event violated Section 441b(a) of the Federal Election Act, the Court held that civil penalties and disgorgement were inappropriate because the Defendants reasonably relied upon the advice of counsel that the fundraiser was conducted in a lawful manner. *Id.* at 1058-59. Specifically, the Court found that:

the absence of evidence that [D]efendants intended to accept improper contributions is a significant factor in determining whether disgorgement or a penalty is appropriate. In defending this litigation, [D]efendants argue that they relied upon the advice of Hughes’ counsel. The Court concludes that this fact is relevant in evaluating [D]efendants’ belief that their conduct was lawful.

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[I]t was reasonable for [Defendants] to rely on the representation that Hughes' counsel had determined that the fundraiser was conducted lawfully. Consequently, the Court finds that [D]efendants' belief that the fundraiser was in compliance with federal election law is relevant to demonstrating [D]efendants' good faith. Moreover, even if the advice of counsel defense were not available, the FEC has failed to show that the [D]efendants acted in bad faith.

Id.

Thus, even if the Commission ultimately finds that any of Oberweis Dairy's television advertisements violate Section 441b of the FECA, civil penalties are not warranted because Oberweis Dairy acted in good faith and reasonably relied upon the advice of outside legal counsel that the advertisement would not violate federal election laws. Prior to airing the advertisements, Oberweis Dairy sought and received the advice of legal counsel regarding the appropriateness of airing Oberweis Dairy television commercials in the event Mr. Oberweis declared his candidacy for the U.S. Senate. Counsel advised Oberweis Dairy that such advertisements would not violate federal election laws as long as they were not aired within 30 days of the March 16, 2004 primary election. Oberweis Dairy reasonably relied upon this advice in proceeding to air the advertisements. Furthermore, like the defendants in *Harman*, Oberweis Dairy truly believed, and still believes, that the advertisements comply with federal election laws. Moreover, as in *Harman*, Complainant has offered no evidence that Oberweis Dairy acted in bad faith by airing its advertisements. Accordingly, even if the Commission were to find that any Oberweis Dairy advertisement violates Section 441b of the FECA, civil penalties are not warranted in this case.

B. The "Meet and Greet" Events and Sweepstakes Contest Complied with Federal Law.

The Complaint's second series of allegations accuse Mr. Oberweis of "systematically extracting other illegal corporate contributions from Oberweis Dairy." (Complaint at 1.) This series of allegations appears to take issue with two separate events. The first event involves an allegation that Mr. Oberweis' "campaign has used Oberweis Dairy stores to host campaign events" and "has given Oberweis Dairy ice cream to prospective supporters at the events." *Id.* The second event involves a sweepstakes contest run by Mr. Oberweis' campaign. *Id.* With respect to this event, Complainant alleges that Mr. Oberweis' campaign has used unspecified "resources to sponsor a sweepstakes contest, offering a lifetime supply of free Oberweis Dairy ice cream to the winner." *Id.* With respect to both events, and without any apparent basis in fact, Complainant then claims that: "Presumably, [Oberweis Dairy] has used Oberweis Dairy employees and facilities to arrange these events and help organize the sweepstakes." *Id.*

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1. The "Meet and Greet" Events Complied With Federal Election Laws.

The Complainant alleges that "[t]he record shows that [Mr. Oberweis] has consistently used Oberweis Dairy assets and resources to support his campaign." (Complaint at 4.) Complainant then suggests that Mr. Oberweis has improperly used Oberweis Dairy resources by holding "meet and greet" events at Oberweis Dairy stores. *Id.* This allegation, however, is premised solely upon second hand information gleaned from a single on-line news article from *The Illinois Leader*. (Complaint at 4, Attachment D.) Citing this news article, Complainant suggests that Mr. Oberweis or his campaign did not pay Oberweis Dairy for ice cream served at these events. That is not true.

Although the article cited by the Complainant states that "[e]very person attending received a free scoop of Oberweis ice cream[,] Oberweis Dairy did not give ice cream away for free at *any* of these "meet and greet" events. To the contrary, the Oberweis Campaign paid Oberweis Dairy the "usual and normal charge" for all ice cream served at the "meet and greet" events.¹ The spurious nature of Complainant's allegations is further evidenced by the fact that the very same article cited by Complainant quotes Mr. Oberweis as stating that the "meet and greet" event discussed in the article was being paid for by his campaign. (Complaint at Attachment D.)

By paying Oberweis Dairy the "usual and normal charge" for all ice cream served at the "meet and greet" events, Oberweis Dairy complied with 11 C.F.R. §114.2(f), which governs the facilitation of contributions to candidates. Specifically, 11 C.F.R. § 114.2(f) provides: "A corporation does not facilitate the making of a contribution to a candidate . . . if it provides goods or services in the ordinary course of its business as a commercial vendor in accordance with 11 CFR part 116 at the usual and normal charge." The term "commercial vendor" is defined in 11 C.F.R. § 116.1(c) as "any person[] providing goods and services to a candidate . . . whose usual and normal business involves the sale . . . or provision of those goods or services." Oberweis Dairy qualifies as a "commercial vendor" because it sells ice cream in its ordinary course of business and provided ice cream at the usual and normal charge at each of the "meet and greet" events. Thus, Oberweis Dairy has not impermissibly facilitated contributions to Mr. Oberweis' campaign.

Likewise, Oberweis Dairy has complied with federal regulations governing the facilitation of contributions to candidates through the use of "corporate facilities." A corporation may facilitate the making of contributions if the candidate reimburses the corporation "within a

¹ Oberweis Dairy will produce under separate cover, records reflecting payments to Oberweis Dairy by the Oberweis campaign for all ice cream served at its "meet and greet" events.

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commercially reasonable time for the use of corporate facilities described in 11 CFR 114.9(d) in connection with . . . fundraising activities[.]” 11 C.F.R. § 114.2(f)(2).

Here, the “meet and greet” events that were held at Oberweis Dairy ice cream stores lasted two hours during the regular business hours of each store. In addition, the events were not exclusive to the Oberweis campaign, as the ice cream stores continued to conduct their ordinary business during the course of the events. The Oberweis campaign paid full price for all ice cream served at the events, a price designed to cover the cost of ice cream sold as well as any incidental overhead costs associated with the operation of an Oberweis Dairy store. Furthermore, for each “meet and greet” event not held at an Oberweis Dairy store, the campaign paid full price for all ice cream purchased. Clearly, Oberweis Dairy has not impermissibly facilitated contributions to Mr. Oberweis’ campaign.

2. The “Sweepstakes Contest” Complied With Federal Election Laws.

The Complainant’s allegations surrounding the “Ice Cream for Life Sweepstakes” are wholly without merit and based on nothing more than unfounded speculation. For instance, the Complainant states that the “sweepstakes . . . show[s] all the earmarks of a corporate-sponsored enterprise.” (Complaint at 4.) In fact, as evidenced on the front page of the sweepstakes entry form attached as Exhibit G to the Complaint, the sweepstakes was “Paid for by Oberweis for U.S. Senate 2004, Inc.” Furthermore, the back side of the entry form correctly indicates that the drawing “will be conducted by Oberweis for U.S. Senate 2004” and that it is being sponsored by Oberweis for U.S. Senate 2004, Inc. Attached hereto as Exhibit B is a true and correct copy of the invoice associated with the sweepstakes and the campaign check to Oberweis Dairy paying for the sweepstakes.

Furthermore, nothing in the sweepstakes entry form even remotely suggests that Oberweis Dairy is contributing anything of value to the sweepstakes, other than “one quart of Oberweis ice cream per month for life . . . up to a maximum of 50 years, whichever is shorter.” (Complaint at Ex. G.) The entry form set the “Maximum Total Retail Value of [the] Prize” at \$2,500. Oberweis for U.S. Senate 2004, Inc. paid Oberweis Dairy for the ice cream prize on or about January 9, 2004. Therefore, Oberweis Dairy has not made an illegal contribution to Mr. Oberweis’ campaign in connection with the sweepstakes. Thus, the Commission should take no action against Oberweis Dairy in this matter.

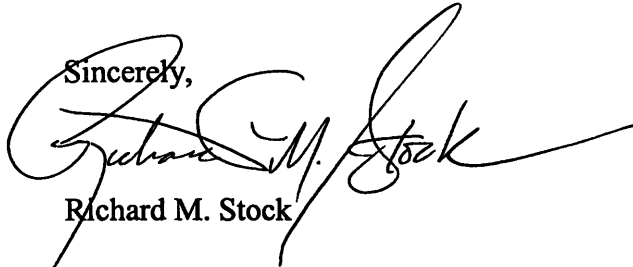
III. CONCLUSION

For all of the foregoing reasons, the Commission should not take any action against Oberweis Dairy in connection with MUR 5410.

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Sincerely,

A handwritten signature in black ink, appearing to read "Richard M. Stock". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Richard M. Stock

Enclosures

cc: Robert R. Renaut

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AFFIDAVIT OF ROBERT R. RENAUT

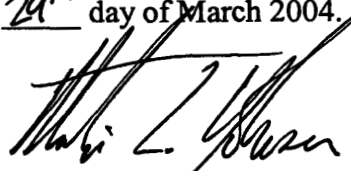
I, Robert R. Renaut, being first duly sworn upon oath, state as follows:

1. I am the President and CEO of Oberweis Dairy.
2. I have read Oberweis Dairy's response in opposition to the complaint filed by the Democratic Party of Sangamon County with the Federal Election Commission (MUR 5410).
3. The factual statements contained in the response are true and correct to the best of my knowledge.

FURTHER AFFIANT SAYETH NOT.


Robert R. Renaut

SUBSCRIBED and SWORN to before me
this 29th day of March 2004.


Notary Public

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